

Montana Water Court
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FILED
05/23/2023
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
43B-0743-R-2022
Lambert, Kathryn
5.00

MONTANA WATER COURT, YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN
BASIN 43B
PRELIMINARY DECREE

CLAIMANTS: Aaron Cain; Glenda Cain; Christopher Fanuzzi; Glacier
Bank; Wesley Ventures LLC

CASE 43B-0743-R-2022
43B 131378-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusion of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must mail a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

This claim appeared in the Preliminary Decree with the following issue remark:

THE CLAIMED PRIORITY DATE MAY BE QUESTIONABLE. THE PRIORITY DATE ON THE SUBMITTED NOTICE OF APPROPRIATION IS 11/23/1934.

The issue remark was not addressed and resolved during the objection process. The

Legislature has directed the Water Court to resolve the issue remarks using the procedures set forth in section 85-2-248, MCA.

Under Section 85-2-248(3), MCA, information in the claim file or other information obtained by the Court can be reviewed to determine if it provides a sufficient basis to resolve the issue raised by a remark. In this instance, the information in the claim file is sufficient to address and resolve the issue remark. In order to give the claimants an opportunity to review the remark and to file additional evidence if they so chose, the Order Updating Caption And Mailing List, Order Removing Ownership Remark, and Order Setting Filing Deadline was issued on January 5, 2023 setting a February 28, 2023 filing deadline. Nothing was filed by the claimants. The March 8, 2023 Order Entering Defaults and Order Setting Deadline Pursuant To 85-2-248(9)(a), MCA was issued stating:

Under Section 85-2-248(3), MCA, information in the claim file or other information obtained by the Court can be reviewed to determine if it provides a sufficient basis to resolve the issue raised by a remark and the Court can provide the claimants an opportunity to file additional information or evidence. The Malcolm C. Story Notice Of Appropriation attached to the Statement of Claim states that the water right was appropriated on November 23, 1934. It appears the priority date should be amended from February 5, 1934 to November 23, 1934 as suggested in the issue remark. Pursuant to 85-2-248(9)(a), MCA, it is

ORDERED that the deadline for the claimants to show cause in writing why the Court should not proceed with amending claim 43B 131378-00 as described above pursuant to section 85-2-248(9)(a), MCA, is **March 28, 2023**. If no additional information is filed by this deadline, the Court will conclude the claimants agree and will proceed with amending the claim as detailed above.

On March 20, 2023 Aaron Cain filed a response stating that the Court should side with the people rather than the DNRC, provided no evidence or rationale supporting the February 5, 1934 priority, and provided no rationale for the Court to disregard the Malcolm C. Story Notice Of Appropriation. Nothing was filed by the other claimants. As stated above in the Order, the Court concludes the other claimants agree with changing the priority date to November 23, 1934. These documents are viewable in the Court's FullCourt Enterprise case management system.

APPLICABLE LAW

"All issue remarks to claims that are not resolved through the filing of an objection as provided in 85-2-233 must be resolved as provided in this section." Section 85-2-248(2), MCA.

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect including for claimants objecting to their own claims. Rule 19, W.R.Adj.R.

FINDINGS OF FACT

1. Statement of Claim 43B 131378-00 was filed by Brent R. Harris on December 9, 1981. A copy of the Statement of Claim is attached to this Master's Report. At item 13, he stated the right claimed is a filed right, priority date February 5, 1934. Item 14 directs attaching a copy of the "Record of Filing". The only record of filing attached to the Statement of Claim is the Malcom C. Story Notice Of Appropriation. A copy of the Notice Of Appropriation is attached to this Master's Report. Item IV on that Notice states that Mr. Story appropriated the water right on November 23, 1934. The Notice was signed by Mr. Story on November 23, 1934 and was filed with the Park County Clerk and Recorder on November 23, 1934. "February 5, 1934" does not appear anywhere in this Notice. There is nothing filed with the Statement of Claim which supports a February 5, 1934 priority date.

2. No evidence was filed by current claimants Aaron Cain, Glenda Cain, Christopher Fanuzzi, Glacier Bank, and Wesley Ventures LLC to support a February 5, 1934 priority date.

3. The Preliminary Decree states that the priority date is February 5, 1934. The priority date should be November 23, 1934. The priority date issue remark should be removed as addressed and resolved.

4. The Preliminary Decree also includes the following remarks:

AS OF 09/28/2017 , THIS WATER RIGHT APPEARS TO BE OWNED BY GLACIER BANK , 4150 VALLEY COMMONS DR , BOZEMAN, MT , 59718-6426.

AS OF 09/28/2017 , THIS WATER RIGHT APPEARS TO BE OWNED BY HINER JACK WESLEY , PO BOX 41 , EMIGRANT, MT , 59027-0041.

Glacier Bank was added as an owner in 2018. Wesley Ventures LLC was added as an owner in 2022. These remarks should be removed as having served their notice purposes.

CONCLUSION OF LAW

The information in the claim file is sufficient to resolve the priority date issue remark without evidentiary hearing. Sections 85-2-248(3) and (9), MCA.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusion of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW

Service Via USPS Mail:

Aaron Cain
2878 US Hwy 89 S
Emigrant, MT 59027-6028
406-223-5943 C

Glenda Cain
1734 N 21st St
Grand Junction, CO 81501-6634

Christopher Fanuzzi
1117 N 7th Ave
Bozeman, MT 59715-2527

Glacier Bank
4150 Valley Commons Dr
Bozeman, MT 59718-6426

Wesley Ventures LLC
% Catherine Mayer
3360 Star Ct
Grand Junction, CO 81506-1944
~~401 E 8th St~~
~~Unit 216, PMB 4004~~
~~Sioux Falls, SD 57103~~
(Returned Mail Received 4/11/2023)

Note: Service List Updated 5/15/2023

STATEMENT OF CLAIM
FOR EXISTING WATER RIGHTS

RECEIVED

IRRIGATION

DEC 09 1981

For the Water Courts of the State of Montana

MONTANA D.N.R.C.
BOZEMAN FIELD OFFICE

131378

43-B

4-PA-4

10-056-01-02

1. Owner of Water Right

HARRIS Last BRENT First P. Middle Initial

Co-Owner or Other
Interest Owner

Last First Middle Initial

Address BOX 313

City EMIGRANT State MONTANA Zip Code 59027

Home Phone No. 333-4469 Business Phone No. 333-4469

2. Person completing form

HARRIS Last BRENT First P. Middle Initial

Address BOX 313

City EMIGRANT State MONTANA Zip Code 59027

Home Phone No. 333-4469 Business Phone No. 333-4469

3. Name of ditch, creek or river

YELLOWSTONE RIVER

Use: ☒ Irrigation

4. Method of Irrigation Use:

☒ Sprinkler ☐ Furrow ☐ Flood

5. Source of Water:

(Check Only One)

☐ Spring Name

☐ Well Name

☒ Stream Name YELLOWSTONE RV Tributary of MISSOURI R

☐ Lake Name Stream

Tributary of

☐ Reservoir Name Stream

Tributary of

6. Point of Diversion:

County PARK

NE 1/4 E2 SE 1/4 SW 1/4, Section 5, T 6S N/S, R 8E E/W

Lot , Block , Subdivision

7. Means of Diversion:

☒ Pump Capacity 1125 gpm

☐ Headgate and ditch or pipe

☐ Flood and dike

8. Means of Conveyance:

☐ Ditch

☒ Pipeline

☐ Other: Explain



9. ^{DNRC} Place of use and acres irrigated. County PARK
3 acres, _____ Lot, _____ Block, NE ^{EE} SE SW ^{SE} 1/4, Section 5, T 6S N/S, R 8E E/W
12 acres, _____ Lot, _____ Block, NE ^{EE} SE SW ^{SE} 1/4, Section 4, T 6S N/S, R 8E E/W
_____ acres, _____ Lot, _____ Block, _____ 1/4 _____ 1/4 _____ 1/4, Section _____, T _____ N/S, R _____ E/W
_____ acres, _____ Lot, _____ Block, _____ 1/4 _____ 1/4 _____ 1/4, Section _____, T _____ N/S, R _____ E/W
_____ acres, _____ Lot, _____ Block, _____ 1/4 _____ 1/4 _____ 1/4, Section _____, T _____ N/S, R _____ E/W
15 Total acres. Subdivision _____

10. Flow rate claimed: 100 ☐ cubic feet per second
☐ gallons per minute
☒ miner's inches

11. Volume claimed: 750 acre-feet per year

12. Period(s) of use: 4 1 to 10 1 30
Month Day Month Day

13. ^{DNRC} Check one: ☐ Decreed Water Right Priority date or date of first use
☒ Filed Appropriation Right 1 FEB. 1 5 1934
☐ Use Water Right Hour Month Day Year

14. Attach copies of the Decree, Record of Filing or Proof of Use Right.

15. Attach copies of aerial photographs, U.S. Geological Survey maps or such other documents necessary to show point of diversion, place of use, place of storage, and conveyance facilities.

16. Notarized Statement signed by claimant.

STATE OF MONTANA)
) ss.
County of Park)

I, Robert L. Jovick, having been duly sworn, depose and say that I, being of legal age and being the claimant of this claim of existing water right, and the person whose name is signed to it as the claimant, know the contents of this claim and the matters and things stated there are true and correct.

Brent P Harris

Subscribed and sworn before me, this 7th day of December 19 81.

Robert L. Jovick
Notary Public for the State of Montana

Residing at Livingston, Mt.

My Commission expires June 19, 1984

PARK COUNTY, MONTANA

Document No. 9892

.....
MALCOLM C. STORY,
-TO-
PUBLIC.
.....

NOTICE OF APPROPRIATION.

STATE OF MONTANA,)
County of Park.) ss.

TO ALL WHOM THESE PRESENTS MAY CONCERN : BE IT KNOWN, That Malcolm C. Story, of Emigrant, in said County and State, do hereby publish and declare, as a legal notice to all the world, as follows, to-wit :

I. That he did on November, 1934, appropriate and now has a legal right to the use, possession and control of and claims twelve hundred and fifty miner's inches (being 31.25 cubic feet per second of time) of the waters of the Yellowstone River in said County and State, for irrigation and other purposes.

II. That the purpose for which said water is claimed, and the place of intended use is irrigation on Sections 8, 4, 3, T 6 S. R 8 E; and Section 33, T 5 S, R 8 E, between the Yellowstone River and the main highway west of said river.

III. That the means of diversion, with size of flume, ditch, pipe or aqueduct by which he intends to divert the said water is as follows : A ditch _____ inches by _____ inches in size, which carries and conducts 1250 inches of water from said river which said ditch diverts the water from said stream at a point upon its west bank, and runs thence approximately parallel to said river in a generally northeasterly-by-north direction for a distance of four miles, more or less, thence over and upon said land.

IV. That he appropriated and took said water on the 23rd day of November, A. D. 1934, by means of said ditch.

V. That the name of the appropriator of said water is Malcolm C. Story.

VI. That he does also hereby claim said ditch and the right of way therefor, and for said water by it conveyed, or to be conveyed from said point of appropriation to said land or point of final discharge, and also the right of location upon any lands of any dams, flumes, reservoirs, constructed or to be constructed, by him in appropriating

any claim, claim, or interest, conveyed or to be conveyed, by him or his heirs and in using said water.

VII. That he does also claim the right to keep in repair and enlarge said means of water appropriation at any time, and the right to dispose of said right, water, ditch or said appurtenances in part or whole, at any time.

CLAIMING THE SAME ALL AND SINGULAR, Under any and all laws National and State, and _____ rulings and decisions thereunder, in the matter of water rights.

TOGETHER WITH ALL AND SINGULAR, The hereditaments and appurtenances thereunto belonging and appertaining or to accure to the same.

WITNESS my hand at Livingston, Montana, this 23rd day of November, 1934.

Malcolm C. Story.

NOTE - 1 cubic foot equals
40 miner's inches.

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STATE OF MONTANA,)
County of Park.) ss.

Malcolm C. Story having first been fully sworn, depose _____ and say _____ that he is of lawful age and is the appropriator and claimant of the order and water right mentioned in the foregoing notice of appropriation and claim, and the person whose name is subscribed thereto as the appropriator and claimant; that he knows the contents of said foregoing notice and that the matters and things therein stated are true.

Malcolm C. Story.

Subscribed and sworn to before me, this 23rd day of November, 1934.

(NOTARIAL SEAL)

C. M. Squire, Notary Public for the
State of Montana,
Residing at Livingston, Montana,
My Commission expires April 20-1937.

Filed for Record the 23rd day of November, 1934, at 4:55 o'clock P. M.

H. W. Knox, County Clerk and Recorder.

131378

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 131378-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners:

AARON CAIN
2878 US HIGHWAY 89 S
EMIGRANT, MT 59027 6028

GLENDA CAIN
1734 N 21ST ST
GRAND JUNCTION, CO 81501 6634

CHRISTOPHER FANUZZI
1117 N 7TH AVE
BOZEMAN, MT 59715 2527

GLACIER BANK
4150 VALLEY COMMONS DR
BOZEMAN, MT 59718 6426

WESLEY VENTURES LLC
401 E 8TH ST
UNIT 216, PMB 4004
SIOUX FALLS, SD 57103

Priority Date: NOVEMBER 23, 1934

Type of Historical Right: FILED

Purpose (use): IRRIGATION

Irrigation Type: SPRINKLER

Flow Rate: 255.82 GPM

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 15.00

Source Name: YELLOWSTONE RIVER

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		E2SE	5	6S	8E	PARK
Period of Diversion:	APRIL 1 TO OCTOBER 31					
Diversion Means:	PUMP					
2		NWSW	4	6S	8E	PARK
Period of Diversion:	APRIL 1 TO OCTOBER 31					

Diversion Means: PUMP

POINT OF DIVERSION IS MOVEABLE ALL ALONG SOURCE WITHIN LEGAL LAND DESCRIPTION.

Period of Use: APRIL 1 TO OCTOBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	3.00		E2SE	5	6S	8E	PARK
2	12.00		NWSW	4	6S	8E	PARK
Total:	<u>15.00</u>						